

A.F.R.

**Court No. - 2**

**Case :- SPECIAL APPEAL DEFECTIVE No. - 255 of 2022**

**Appellant :-** Zuhair Bin Saghir

**Respondent :-** State Of U.P. Thru. Its Prin. Secy. Vigilance Deptt. Lko. And Others

**Counsel for Appellant :-** Asit Srivastava, Akhilesh Kumar Kalra

**Counsel for Respondent :-** C.S.C.

**Hon'ble Devendra Kumar Upadhyaya, J.**

**Hon'ble Saurabh Srivastava, J.**

**(C.M.Application No. 1 of 2022)**

1. Having heard the learned counsel for the appellant-petitioner, learned State Counsel and having gone through the averments made in the application seeking condonation of delay, we find that the delay in filing this Special Appeal has sufficiently been explained.

2. Accordingly, application is allowed and the delay in preferring the Special Appeal is hereby condoned.

**(Oder on memo of Appeal)**

3. Heard the learned counsel for the appellant-petitioner and learned counsel representing the State-respondents.

4. We have also perused the record available on this Special Appeal.

5. By instituting the proceedings of this intra-court appeal under Chapter VIII Rule 5 of the Rules of the Court, the appellant-petitioner has questioned the order dated 18.05.2022, passed by the learned Single Judge in Writ-A No.2894 of 2022, whereby the said writ petition has been dismissed.

6. At this juncture itself, we may note that by instituting Writ-A No.2894 of 2022, the appellant-petitioner had challenged the

validity of the order dated 16.03.2022, passed by the State Government in the Vigilance Department whereby the representation made by the appellant-petitioner, dated 16.08.2021 pursuant to an order passed by this Court on 08.01.2020 in an earlier Writ Petition No.32018(MB) of 2019, was rejected. The prayer made in the said representation dated 16.08.2022, which has been rejected by the State Government by means of order dated 16.03.2022, was that the open vigilance enquiry conducted against him by the Vigilance Establishment and consequently the decision to initiate the criminal proceedings against him be set aside.

7. The State Government considered the said representation in compliance of the order dated 08.01.2020 passed by this Court in Writ Petition No.32018(MB) of 2019 and rejected the same. It is this order, as observed above, which was challenged by the appellant-petitioner before the learned Single Judge.

8. Before delving into the submissions made by the learned counsel for the respective parties, we may note that one complaint against the appellant-petitioner was made while he was posted as District Magistrate, Moradabad. The preliminary enquiry into the said complaint was conducted by the Senior Superintendent of Police, Moradabad which was made available to the State Government, vide his letter dated 27.04.2017. In the said enquiry report, dated 27.04.2017 submitted by the Senior Superintendent of Police, Moradabad, a recommendation was made to get an open enquiry conducted and accordingly direction was issued to the U.P. Vigilance Establishment for conducting an open enquiry. The U.P. Vigilance Establishment, having been so directed, conducted the open enquiry into the allegations against the appellant-petitioner and submitted its report on 11.05.2018 which

was considered and accordingly, Vigilance Establishment recommended for instituting a criminal case against the appellant-petitioner and its investigation.

9. The recommendation made by the U.P. Vigilance Establishment was considered and accordingly the State Government at the appropriate level took a decision on 17.07.2018 for criminal investigation into the allegations against the appellant-petitioner.

10. The appellant-petitioner before filing Writ-A No.2894 of 2022 had instituted a writ petition bearing No.32018 of 2019(MB) before this Court with the prayer for quashing the open enquiry report conducted by the Vigilance Establishment. Further prayer made by the appellant-petitioner in the said writ petition was that the State Government may be directed not to initiate criminal prosecution/proceeding against him on the basis of the said open vigilance enquiry conducted on the complaint made by the complainant-Dushyant Raj Chaudhary. It was further prayed in the said writ petition that direction be issued to the State Government to first comply with the provisions of the Government Orders dated 09.05.1997, 01.08.1997 and 24.05.2012 and only then to entertain the complaint and proceed accordingly in terms of the alleged mandatory provisions contained in the Government Order dated 24.05.2012.

11. We may notice that the primary submission made by the learned counsel for the appellant-petitioner in the said writ petition was that the complaint against him has been enquired into in derogation of the provisions contained in various Government Orders mentioned above and as such on the basis of such enquiry, neither any open vigilance enquiry could have been ordered nor any criminal prosecution could be ordered against him.

12. The aforesaid writ petition was finally disposed of by this Court by means of judgment and order dated 08.01.2020, whereby the Court had directed that the appellant-petitioner shall move a detailed representation before the Chief Secretary of the State of U.P. taking his defence and the objections against the complaint and in case any such representation is moved by the appellant-petitioner, the Chief Secretary shall examine the same and pass appropriate speaking order after considering the submissions which may be made in the representation. The Court in its order dated 08.01.2020 had also provided that the State authorities shall not proceed against the appellant-petitioner till the representation is decided.

13. In pursuance of the said order dated 08.01.2020, the appellant-petitioner submitted his representation on 16.08.2021 and the Chief Secretary of the State Government decided his representation by order dated 16.03.2022, which, as observed above, was challenged by the appellant-petitioner before the learned Single Judge in Writ-A No. 2894 of 2022.

14. The learned Single Judge after considering the case of the respective parties has dismissed the said writ petition by means of order dated 18.05.2022 which is under appeal before us.

15. As has been the case of the appellant-petitioner earlier, the primary submission of learned counsel for the appellant-petitioner is that the complaint made by the complainant against the appellant-petitioner ought to have been dealt with by the State authorities by following the provisions contained in the Government Orders, which have been referred to herein above. It has, thus, been argued that the said Government Orders being mandatory could not have been defied by the State authorities and any deviation from the said Government Orders not only vitiates

the entire action initiated against the appellant-petitioner but the same also seriously prejudices him.

16. Learned counsel for the appellant-petitioner has also urged that the Chief Secretary while deciding the representation preferred by the appellant-petitioner pursuant to the order of this Court, dated 08.01.2020 has not given his own views or findings; rather he has reiterated what ever had happened earlier and as such the order passed by the Chief Secretary which was under challenge before the learned Single Judge cannot be said to be a reasoned order which was to be passed by him in pursuance of the direction issued by this Court by means of its order dated 08.01.2020.

17. It has also been argued on behalf of the appellant-petitioner that it is the admitted case of the parties that the complaint made by the complainant against the appellant-petitioner was not accompanied by an affidavit and as such in this view of the matter either the State authorities ought to have insisted for filing of affidavit by the complainant or the complaint would not have proceeded further in absence of the affidavit, which is a mandatory requirement in terms of the Government Orders referred to herein above for enquiring into any complaint against the State Government officers, specially against Class-I officers.

18. Further submission of learned counsel for the appellant-petitioner is that certain findings were recorded by this Court in its order dated 08.01.2020 which have clearly been ignored by the Chief Secretary while passing the order dated 16.03.2022 and all these aspects of the matter have clearly not been taken into account by the learned Single Judge while dismissing the writ petition instituted by the appellant-petitioner. Accordingly, submission is that the order passed by the learned Single Judge is

not sustainable.

19. Impeaching the findings recorded by the learned Single Judge to the effect that the Government Orders relied upon by the appellant-petitioner are not mandatory, it has been submitted by the learned counsel representing the appellant-petitioner that considering the purport and purpose of the said Government Orders, the provisions contained therein are mandatory and the purpose is not to cause any prejudice to the government officer against whom such unsubstantiated complaint, not even supported by an affidavit, is received. To fortify his submission, learned counsel for the appellant-petitioner relies upon a **judgment dated 03.01.2012, passed by this Court in Writ Petition No. 4372(SS) of 2011; Kumdesh Kumar Sharma Vs. State of U.P. and others**, which provides that various Government Orders issued from time to time in relation to dealing with the complaints are to be strictly followed as the purpose of such Government Orders is not only to safeguard the government officers from unnecessary harassment but also to curb the tendency of making frivolous and anonymous complaints against the government servants.

20. On the basis of aforesaid submissions, it has been prayed that the order under appeal herein passed by the learned Single Judge be set aside and the matter be remitted to the learned Single Judge for decision afresh.

21. Learned Additional Chief Standing Counsel, Sri Amitabh Rai representing the State-respondents has vehemently opposed the Special Appeal by asserting firstly that the Government Orders being relied upon by the appellant-petitioner do not contain any mandatory provisions; rather the provisions therein are directory and in certain circumstances deviation from such provisions is permissible for the State Government which has to



be always vigilant over the conduct of its officers, specially in a case of complaint relating to serious of charges and corruption etc. Sri Rai has secondly submitted that so far as open vigilance enquiry is concerned, the same is conducted in terms of the provisions contained in the Vigilance Manual of the State Government and keeping in view the provisions of U.P. Vigilance Establishment Act, 1965 which is a State Legislation enacted for the purposes of enquiring into the misconduct and other such allegations from the vigilance angle. He has, thus, argued that in case of any open vigilance enquiry by the Vigilance Establishment, the Government Orders being referred to by the appellant-petitioner will have no application and such vigilance enquiry is to be conducted independent of the provisions contained in the Government Orders. According to Sri Rai, learned State Counsel, the procedure as per the Vigilance Manual which is in vogue in the State of U.P. is that on receiving any complaint or on any fact coming to the notice of the State Government otherwise, an open vigilance enquiry can be ordered and report of such open vigilance enquiry is considered by the Vigilance Department in consultation with the Administrative Department and there upon at the competent level of the State Government a decision is taken either to institute departmental proceedings or to institute criminal prosecution or both. His submission, thus, is that so far as the vigilance enquiry is concerned, the Government Orders relied upon by the appellant-petitioner do not have any application. The submission, thus, is that the learned Single Judge has considered all these aspects of the matter and has come to the conclusion that there is no irregularity or illegality in the order dated 16.03.2022, passed by the Chief Secretary and hence, this Special Appeal is liable to be dismissed at its threshold.

22. We have given our thoughtful consideration to the rival submissions made by the learned counsel representing the respective parties.

23. The facts, as noticed above, make it clear that apart from the preliminary enquiry conducted by the Senior Superintendent of Police, Moradabad, the Vigilance Establishment under the provisions of Vigilance Manual and also in terms of the provisions contained in U.P. Vigilance Establishment Act, 1965 conducted an open vigilance enquiry which was considered by the State Government at the appropriate level and accordingly a decision was taken to launch criminal prosecution into the allegations against the appellant-petitioner.

24. It is not in dispute that apart from the fact finding enquiry conducted by the Senior Superintendent of Police, Moradabad, another fact finding enquiry was conducted by a Committee constituted by the Commissioner, Moradabad Division. However, these are not the only two fact finding enquiries on the basis of which the decision to institute criminal prosecution against the appellant-petitioner has been taken, the basis of such decision rather is the open vigilance enquiry conducted by the Vigilance Establishment.

25. We are of the opinion that basis for conducting open vigilance enquiry in terms of the provisions contained in Vigilance Manual and also in terms of the statutory provisions contained in U.P. Vigilance Establishment Act, 1965 is the availability of some material before the State Government warranting such an open vigilance enquiry which would suffice and not the source of material in respect of allegations of misconduct or corruption or any other charge against the employee or officer concerned.



26. So far as the emphasis laid by the learned counsel for the appellant-petitioner on the Government Orders referred to herein above, is concerned, we are in agreement with the findings recorded by the learned Single Judge in the order which is under appeal before us. Learned Single Judge after considering the purpose and purport of the various Government Orders has referred to certain judgments of Hon'ble Supreme Court laying down the test for determination of a particular provision being mandatory or directory and has held the Government Orders to be directory.

27. No doubt, the very purpose of issuance of the Government Orders being relied upon by the appellant-petitioner is to safeguard the interest of the government officers from unnecessary harassment and curb the tendency of making frivolous and anonymous complaints against the government servants as laid down by this Court in the case of **Kumdesh Kumar Sharma (supra)**, however, so far as the institution of open vigilance enquiry is concerned, the procedure, in our opinion, is to be governed by the provisions contained in the Vigilance Manual in light of the provisions of U.P. Vigilance Establishment Act, 1965.

28. As observed above, we may emphasize that for instituting the open vigilance enquiry, it is the material which is significant and not the source from where such material is received by the State Government.

29. There may be various sources of collecting and gathering relevant material on the basis of which the State Government forms an opinion whether to institute open vigilance enquiry or to institute departmental proceedings or to draw both these proceedings into the allegations available against the appellant-

petitioner. The report of the fact finding enquiry is one such source. Another source may be some complaint. There may be various other sources from where the State Government may gather relevant material. However, availability of such material before the State Government is important and not as to whether such material has been received on the basis of some complaint or through fact finding enquiry or from any other source.

30. Learned counsel for the appellant-petitioner has made an attempt to take us to the factual aspects of the matter by referring to the extract of the representation dated 16.08.2021 made by the appellant-petitioner which has been reproduced in the order dated 16.03.2022 and the finding recorded by the Chief Secretary thereon.

31. As is well settled, concern of the Court while exercising its jurisdiction under Article 226 of the Constitution of India i.e. while exercising the powers of judicial review is not the decision; rather the decision making process.

32. So far as the factual aspects are concerned, it is primarily preserve of the executive and administrative authorities and unless and until there is any perversity in findings of fact arrived at by the authority concerned, any interference by this Court in exercise of its power of judicial review will be impermissible.

33. As regards the submission of learned counsel appearing for the appellant-petitioner that this Court in its order dated 08.01.2020 passed in earlier writ petition filed by the appellant-petitioner that the vigilance enquiry has been conducted without adhering to the provisions contained in the Government Orders, is concerned, we may only opine that said findings contained in the order dated 08.01.2020 will loose its impact in this case for the reason that the open vigilance enquiry is to be regulated primarily

by the provisions contained in the Vigilance Manual and not in terms of the procedure as given in the Government Orders. Further, the order dated 08.01.2020 had directed the Chief Secretary to consider all the aspects in the matter which have been considered by him while passing the order dated 16.03.2022.

34. Much emphasis has been laid by the learned counsel representing the appellant-petitioner on the Government Order dated 14.04.1981, which provides that in case any complaint is received against the employee or the officer, the enquiry should be conducted by an officer at least two rank higher than the officer against whom complaint is made, however, while doing so it should be kept in mind that the rank of the enquiry officer should be below the rank of punishing authority. The said Government Order, in our opinion, will have application in case any fact finding enquiry results into the institution of any departmental proceeding. The Government Order, dated 14.04.1981 will have no application so far as the open vigilance enquiry is concerned for the reasons which have been elaborated above.

35. In view of the discussions made and the reasons given above, in our considered opinion, the order dated 18.05.2022, passed by the learned Single Judge in Writ-A No. 2894 of 2022 does not warrant any interference by this Court in this Special Appeal. The Special Appeal is, thus, hereby **dismissed**.

36. There will be no order as to costs.

**Order Date :- 23.11.2022**

Sanjay